Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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Criminal History

INVALID PRIOR CONVICTIONS

Sixth Circuit holds en banc that "a narrow window of challenge to prior convictions is available" to defendants sentenced under the Guidelines. Defendant challenged the validity of two prior state convictions for violent felonies that would have placed him in the career offender category. The district court held that the convictions were invalid under state law and defendant should not be sentenced as a career offender. The original appellate panel held that the validity of the convictions had to be determined not under state law but under federal constitutional standards, and remanded after finding that federal standards were not violated. That opinion was withdrawn for rehearing en banc "to decide whether a defendant may challenge at sentencing a prior state court conviction not previously ruled invalid which would result in a longer sentence if included within the Sentencing Guidelines calculus."

The majority of the en banc court held that "under certain limited circumstances it is within a sentencing court's discretion to entertain a challenge to the inclusion of a prior state conviction in a criminal history score. . . . [T]he defendant must first comply with the procedural requirements for objecting to the conviction's inclusion in the criminal history score. The defendant also must state specifically the grounds claimed for the prior conviction's constitutional invalidity in his initial objection and 'the anticipated means by which proof of invalidity will be attempted—whether by documentary evidence, including state court records, testimonial evidence, or combination—with an estimate of the process and the time needed to obtain the required evidence.' . . . An example of a challenge that a court should entertain would be a challenge to a previously unchallenged felony conviction where the defendant was not represented by counsel, counsel was not validly waived, and court records or transcripts are available that document the facts."

"In addition to the types of proof that will be offered, the court also should consider whether the defendant has available an alternative method for attacking the prior conviction either through state post-conviction remedies or federal habeas relief. While this factor should not be dispositive of whether a sentencing court should entertain such a challenge, the availability of an alternative method should play a significant role in the court's decision." The court stated that its holding is similar to the Fourth Circuit's approach that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." *U.S. v. Byrd*, 995 F.2d 536, 540 (4th Cir. 1993) [5 *GSU* #15].

As to defendant's challenge, the en banc court held that the district court erred in finding that the prior convictions were invalid under state law: "When the inclusion of a prior state conviction in the criminal history score is challenged, the validity of that conviction must be determined solely as a matter of federal law." Holding that the convictions were valid under federal law, the court reversed and remanded.

Twelve of the fourteen members of the en banc court joined in the result. Six joined the opinion on the issue of what circumstances a district court must consider before allowing a challenge to prior convictions; one judge concurred but would allow district courts more discretion. Five judges would further limit such challenges. The two judges who dissented from the result would allow challenges to prior convictions as a matter of right, as in *U.S. v. Vea-Gonzalez*, 999 F.2d 1326 (9th Cir. 1993) (superseding 986 F.2d 321 [5 *GSU* #10]).

U.S. v. McGlocklin, No. 91-6121 (6th Cir. Sept. 17, 1993) (en banc) (Guy, J.) (dissenting opinions noted above).

See *Outline* at IV.A.3.

Sentencing Procedure

Eleventh Circuit holds that defendants may waive right to appeal Guidelines sentences, but the waiver must be specifically addressed in the plea colloquy. Defendant appealed his sentence. The government argued the appeal should be denied because defendant's plea agreement includ-ed a waiver of his "right to appeal or contest . . . his sentence on any ground," unless the sentence was in violation of law.

The appellate court held that, under most circumstances, "a defendant's knowing and voluntary waiver of the right to appeal his sentence will be enforced." However, "for a waiver to be effective it must be knowing and voluntary [and] . . . in most circumstances, for a sentence appeal waiver to be knowing and voluntary, the district court must have specifically discussed the sentence appeal waiver with the defen-dant during the Rule 11 hearing." To enforce a waiver, either the district court must have "specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy" or it must be "manifestly clear from the record that the defendant otherwise understood the full significance of the waiver."

Here, the court held the district court "did not clearly convey to Bushert that he was giving up his right to appeal under *most* circumstances. . . . Nor does . . . the record [show] that Bushert otherwise understood the full significance of his sentence appeal waiver." The court concluded that "the remedy for an unknowing and involuntary waiver is essentially severance"—the waiver "is severed or disregarded . . . while the rest of the plea agreement is enforced as written and the appeal goes forward." The appellate court found defendant's claims of sentencing error had no merit and affirmed his sentence.

U.S. v. Bushert, 997 F.2d 1343 (11th Cir. 1993).

Evidentiary Issues

U.S. v. Jenkins, No. 91-3553 (6th Cir. Aug. 20, 1993) (Joiner, Sr. Dist. J.) (Affirmed: Cocaine excluded at trial because it was seized during an unconstitutional search was properly used to calculate defendants' offense levels. Evidence illegally seized for the purpose of sentence enhance-ment would be excludable, but there was "no indication in the record that this evidence was obtained to enhance defen-dants' sentences." The court distinguished as dicta the conclusion in *U.S. v. Nichols*, 979 F.2d 402, 410–11 (6th Cir. 1992), that unlawfully seized evidence should not be used in setting the base offense level.) (Keith, J., dissented on this issue).
See *Outline* at IX.D.4.

Adjustments

Use of Special Skill

U.S. v. Mainard, No. 92-10298 (9th Cir. Sept. 20, 1993) (Fernandez, J.) (Remanded: Enhancement under § 3B1.3 for use of special skill was improperly given for defendant's "sophistication in methamphetamine manufacturing" and "ability to pass his expertise along to others." There was "no evidence that Mainard was a trained chemist or pharmacist . . . who abused his skills to produce drugs." "Although the methamphetamine laboratory might have been sophisticated, nothing indicates that Mainard used any 'pre-existing, legitimate skill not possessed by the general public,'" and "being skilled at the clandestine manufacturing of methamphetamine is not a 'legitimate' skill" under § 3B1.3.). *Accord U.S. v. Young*, 932 F.2d 1510, 1512–15 (D.C. Cir. 1991) (mere fact that defendant learned how to manufacture PCP—which by definition requires special skill—insufficient for § 3B1.1).

Compare U.S. v. Spencer, No. 93-1041 (2d Cir. Aug. 25, 1993) (Altimari, J.) (Remanded for recalculation of drug amount, but affirmed special skill enhancement for defendant convicted of methamphetamine offenses. Although "special skill" "usually requir[es] substantial education, training, or licensing," § 3B1.3, comment. (n.2), and defendant was self-taught, he "presents the unusual case where factors other than formal education, training, or licensing persuade us that he had special skills in the area of chemistry. . . . [He] experimented often as an amateur chemist . . . , built an extremely sophisticated home chemistry laboratory . . . , used his chemical acumen professionally . . . to conduct a joint project [with a chemist] to develop a sophisticated medical testing device," and had taken college courses.). *Accord U.S. v. Hummer*, 916 F.2d 186, 191–92 (4th Cir. 1990) (self-taught inventor had acquired requisite "special skill" through experience).

See also U.S. v. Muzingo, 999 F.2d 361 (8th Cir. 1993) (Affirmed: Defendant used "special skill" to break into safe-deposit boxes He made keys to the boxes, "a skill that he acquired during his ten-year employment with a company that manufactures safe-deposit boxes and keys." There was also evidence he had technical drawings and a "little gadget" he used to determine the profile of the keys that he required.).
See *Outline* at III.B.9.

Probation and Supervised Release

Revocation of Supervised Release

U.S. v. Truss, No. 92-2171 (6th Cir. Sept. 8, 1993) (Suhrheinrich, J.) ("[W]e find the majority's position persuasive and join [most circuits] in holding that, while an additional term of supervised release may be in the best interests of an orderly administration of justice, no additional term of supervised release is permitted by § 3583(e)(3)."). *Accord U.S. v. Tatum*, 998 F.2d 893 (11th Cir. 1993) (per curiam) (Remand-ed: "We join the majority of circuits that have addressed this issue and hold that upon revocation of a term of supervised release, a district court is without statutory authority to impose both imprisonment and another term of supervised release.").
See *Outline* at VII.B.1.

Offense Conduct

More than Minimal Planning

U.S. v. Wong, No. 92-5570 (3d Cir. July 30, 1993) (Mansmann, J.) (Affirmed: When appropriate, both enhancement for more than minimal planning and adjustment for role in offense may be given: "The upward adjustments mandated respectively by §§ 2B1.1(b)(5) and 3B1.1(c) operate independently of each other . . . . [W]e hold that where a defendant is not only a participant in a sophisticated criminal scheme, but is also one of the more culpable individuals in that scheme, the two enhancements may be applied in tandem.").

Contra U.S. v. Chichy, No. 92-3481 (6th Cir. Aug. 6, 1993) (Contie, Sr. J.) (Remanded: It is "impermissible double counting" to impose both enhancements. The appellate court held it was bound by *U.S. v. Romano*, 970 F.2d 164, 167 (6th Cir. 1992), which held that separate enhancements under § 2F1.1(b)(2) and § 3B1.1(a) were improper. "We believe the same reasoning applies to subsection (c) of § 3B1.1. . . . Although it is possible for a defendant to receive an enhancement under § 2F1.1(b)(2) for more than minimal planning without being an organizer, leader, manager, or supervisor under § 3B1.1(c), the converse is not true. A defendant cannot receive an enhancement for role in the offense under § 3B1.1(c) unless he has engaged in more than minimal planning.").
See *Outline* at II.E and III.B.6.

Calculating the Weight of Drugs

U.S. v. Newsome, 998 F.2d 1571 (11th Cir. 1993) (Remanded: *U.S. v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991), a drug importation case, applies to conspiracy to manufacture and possess cases. Thus, for defendants convicted of conspiracy to manufacture and possess methamphetamine, it was error to include amounts of discarded "sludge" that contained less than one percent methamphetamine and "were not only unusable, but also toxic." Courts may, however, use "the approximation approach" in § 2D1.1, comment. (n.12), if the amount of drugs seized does not reflect the scale of the offense and the evidence supports that method.).

Compare U.S. v. Nguyen, No. 92-8032 (10th Cir. Apr. 13, 1993) (Saffels, Sr. Dist. J.) (Affirmed: District court properly used entire weight of "a 10.3 gram 'eight-ball' comprised of small pieces of yellowish cocaine base mixed with white sodium bicarbonate powder." Defendant argued that crack cocaine is not usually combined with sodium bicarbonate powder, but the appellate court stated: "This is not an absurd case, but one in which the sodium bicarbonate could have remained after the distillation into the final cocaine base form. In addition, the defendant purchased the drug in this form and sold it in this form.") (previously unpublished table opinion, 991 F.2d 806, to be published in full).
See *Outline* at II.B.1.